IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 54 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HITESHBHAI KANCHANLAL MODI

Versus

FALGUNIBEN HITESHKUMAR MODI

Appearance:

1. Criminal Revision Application No. 54 of 2003

MR AV PRAJAPATI for Petitioner No. 1

MR TS NANAVATI for Respondent No. 1

MS MANISHA L SHAH Ld. APP for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 24/06/2003

ORAL JUDGEMENT

Ld. advocates for both the sides have agreed to hear this revision application finally and, therefore,

this revision application is heard finally.

According to the brief facts of the case, the applicant - Hiteshbhai Kanchanlal Modi and respondent no. 1Falguniben Hiteshbhai Modi married before nine years and having two issues out of the wedlock. One son whose birth date is 18.8.1997 and next one Dwip whose date of birth is 15.7.2000. It appears that the marriage life of the spouse faced doldrums and rough weather and on 3.6.2002 present respondent no. 1-wife left in-law's home alone leaving two sons with the husband. Parties have allegations and counter allegations made about the facts of leaving the house by wife to the extent that as per the allegation of wife, she was driven out by torturing and as per the husband, the wife left on her own volition leaving two children with the husband. That apart, but the root of this application is in Criminal Misc. Application NO. 486/2002 filed by wife Falguniben in the court of Chief Judicial Magistrate, Bharuch under sec. 97 of Code of Criminal Procedure for the custody of both the minor children from the husband. It was alleged that the children were not handed over to their mother and they are not taken proper care by the husband and hence, it was prayed that the custody of two minor children be handed over to the applicant-wife Falguniben from husband - Hiteshbhai. The said application, after hearing the parties, resulted in rejection vide order of ld. Chief Judicial Magistrate, Bharuch on 12.11.2002, against which, the applicant-wife filed Criminal Revision Application No. 106/2002 in the Court of Ld. Additional Sessions Judge, Bharuch. After hearing the parties, ld. Addl. Sessions Judge, Bharuch vide his order dated 30.1.2002 allowed the revision application and husband was ordered to give custody of both the children to the applicant-wife. The said order is under challenge in this revision application.

Ld. Advocate Mr. AV Prajapati appearing on behalf of applicant-husband drawing the attention of this Court on sec. 97 of Code of Criminal Procedure and after relying upon the decision of the Apex Court in the matter of Ramesh vs. Laxmi Bai, reported in (1998) 9 SCC p. 266 and a decision of the High Court of Orissa in the matter of Duryodhan Mahanta vs. Saraswati Mahanta, reported in 1992(1) Crimes p. 13, vehemently argued that in the facts and circumstances of the case, sec. 97 of the Code of Criminal Procedure never attracted. It was urged that wife deserted the husband leaving two children with the husband and husband also being natural guardian, the question of confinement to the extent of the offence in respect of custody of minor by the husband would not

arise at all. While ld. advocate Mr. TS Nanavati on behalf of respondent no. 1-wife - ori. applicant before the ld. Chief Judicial Magistrate, Bharuch, attempted to distinguish the decision of the Apex Court in the matter of Ramesh vs. Laxmi Bai (supra) on the fact and stated that the mother is a natural guardian of minors. According to Mr. Nanavati, one child is of four years and other is 2 & 1/2 years of age. It was urged that the paramount consideration of welfare of minor children must be taken into consideration and in no way ld. Addl. Sessions Judge committed an error in passing the order impugned in this revision application. It was urged that the father works for the whole day and his parents are not capable of taking proper care of minor children. It was urged, therefore, that the order directing handing over the custody of minor children to mother from the father is not illegal under sec. 97 of the Code of Criminal Procedure. He has also relied upon the decision of the Apex Court in the matter of Anjali Anil Rangari vs. Anil Kripasagar Rangari & Ors., reported in 1997 SCC (Cri.) p. 827.

Having regard to the controversy raised in this revision application and examining the scope of sec. 97 of the Code of Criminal Procedure, it appears that expedient and urgent remedy is provided under sec. 97 of the Code of Criminal Procedure. The pre-condition for invoking this urgent remedy would be two; i.e. one, the person for whom the warrant is issued is confined and the second is that such a confinement must be an offence. When the facts of this case is perused, it clearly appears that the separation between the spouse was from 3.6.2002. The application before ld. Chief Judicial Magistrate, came to be filed on 18.10.2002. It is alleged that during this period, attempts were made by wife to obtain custody of minor children from husband, but the pivotal issue which requires to be decided is whether sec. 97 is attracted at all in the circumstances found from record. It is established position of law that the father is also natural guardian of children. The custody of father ordinarily cannot be said to be confinement constituting an offence. Unless it is shown that the custody of natural guardian in the given circumstances is confinement to the extent of an offence so as to attract sec. 9. The attempts of ld. advocate Mr. Nanavati to distinguish the decision of Apex Court in the matter of Ramesh (supra) on facts must fail because the Supreme Court laid down a principle that sec. 97 of the Code of Criminal Procedure was not attracted because Supreme Court laid down the law that in respect of custody of minor by natural guardian sec. 97 of the

Code of Criminal Procedure was not attracted. The other decision of the Apex Court on which Mr. Nanavati placed reliance is also support the contention of the applicant and not respondent no. 1. IN the said decision, the Apex Court has observed in para-3 in categorical terms as under:

"The only question that needs to be considered in the context of the facts and circumstances of the present case is as to whether provisions of Section 97 CrPC could be invoked. It cannot be disputed that the mother is also a natural guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956. If it is so, could it be said that the custody of the two minor children with the mother was illegal and they were under her wrongful confinement ? In the facts and circumstances of the case, we are unable to hold that the custody of the children with the mother was either unlawful or they were wrongfully confined by the mother at Delhi. If this be so the very basis of the impugned order cannot be sustained and consequently the impugned order is required to be set aside. We accordingly do so."

In this view of the matter, it was not within competence of the ld. Addl. Sessions Judge to enter into arena of paramount consideration of welfare of children as has been done in criminal revisional jurisdiction and in a revision filed against anorder under sec. 97 of Code of Criminal Procedure. It is for the civil court to decide such an issue in appropriate proceedings.

For this revision application, it is sufficient to conclude that the custody of father of minor children cannot be labelled as confinement as to constitute an offence to issue search warrant for the custody of the children and for this brief reason, the order passed by the ld. Addl. Sessions Judge, Bharuch is required to be set aside and the order passed by the ld. Chief Judicial Magistrate, Bharcuh is required to be restored. This revision application is allowed in these terms. The parties will be at liberty to pursue civil remedy available to them and the observations made in this judgment shall not come in the way of any of the party in any of civil litigation in this respect.

(J.R. VORA, J.)
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